IN THE

Supreme Court of the United States

October Term, 1974

No. 74-165
No. 74-167
No. 74-168

UNITED STATES OF AMERICA, *et al.*,
Appellants,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUPPLEMENTAL BRIEF OF APPELLEES, CONNECTICUT GENERAL INSURANCE CORPORATION, *ET AL.*, FILED PURSUANT TO RULE 41(5)

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This Supplemental Brief is filed on behalf of Appellees, Connecticut General Insurance Corporation and others, pursuant to Rule 41(5), to acquaint the Court with those Appellees' views concerning the decision of September 30, 1974, handed down by the Special Court established under the Regional Rail Reorganization Act of 1973 (the "Rail Act" or the "Act").[1]

[1] References to the Opinion of the Special Court by Friendly, J. will be indicated "(Sp. Ct. Op., p.)." References to other opinions in the Special Court will specify the identity of the judge authoring the opinion.

Judge Thomsen summarized as the conclusion of the Court "that the process established by RRRA is fair and equitable, in that a Tucker Act remedy is available for any interim erosion which reaches unconstitutional proportions and for any compelled conveyance for a consideration found not to meet constitutional standards. . . ." (Sp. Ct. Op., Thomsen, J., pp. 9-10).

As the Solicitor General has put it, the Special Court determined "that the reorganization process prescribed by the Rail Act satisfies the statutory standards of fairness and equity if but only if this Court holds that the Court of Claims will have jurisdiction to try taking claims arising out of the final conveyance." (Reply Brief for the Federal Parties, p. 5).

The effect of the Special Court decision, therefore, is to refine considerably the issues as they now confront this Court. In this Brief Appellees deal briefly with the relation of the Special Court's decision to the present posture of this case as to (1) the "Tucker Act issue" and (2) the constitutional inadequacy of the Rail Act on its own terms.[2]

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[2] Appellees believe that the Special Court erred in many factual and legal details. For example, its analysis of Penn Central financial data was materially in error; its analysis of the financial prospects of Penn Central based on its misapprehension of income statement figures for a single month—after the 180-Day Decision—led it to economic prognoses inconsistent with the 120-Day Decision and Findings of Fact as well as the stipulations of the parties as to reorganizability; its appraisal of likely regulatory climate as to rate increases to compensate for inflation was unsupported by any evidence and is controverted by massive industry experience; its analysis of rate increases under ICC *Ex Parte 305* was wholly speculative; its analysis of the uncontradicted testimony of witness Ingraham as to the dismal prospects for Conrail relied heavily on modifications of the witness' assumptions for which variations there was not a scintilla of supportive evidence and relied also upon testimony

(Footnote continued)

I.

The Tucker Act Question

The treatment of the Tucker Act issue has assumed a disturbingly artificial character in the Appellants' Briefs and the Special Court Opinion. Appellees contend the issue has to be dealt with in a far less recondite way than the Special Court employed.

Appellees submit that the Special Court's view as to the availability of a Tucker Act remedy of last resort is precluded by any fair reading of the Rail Act itself and is utterly inconsistent with the Congressional purpose and policy in enacting the Rail Act. Moreover, the ostensible availability of a Tucker Act remedy for any constitutional injury sustained by Appellees is wholly illusory and in no real sense affords them any "adequate remedy at law."

These contentions spring from a common origin: Appellees contend that in the Rail Act Congress did precisely what it meant to do, and the resultant statute should be judged

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(Continued footnote)

adduced in the *Ann Arbor* proceedings as to which the Penn Central parties had no opportunity to cross-examine or brief. The Special Court also indulged in dicta, unsupported by any evidence or authority, concerning valuation principles, the impact of economic fluctuations on the value of the estate, proper regulatory behavior and predictable rates of return, and numerous other matters. It also overrode, with virtually no analysis or authority, serious legal positions relating to its decisional role under the doctrine of *res judicata*, the due process implications of its ruling, and the manifest non-uniformity of the Rail Act.

While it is tempting to launch into a rebuttal of the treatment accorded these and other issues in the Special Court Opinion, this Brief will be confined to the large legal issues actually decided by the Special Court which now assume overriding importance in the decisional process of this Court.

on its own terms. Recourse to "saving" canons of construction in this case serve predominantly to alter the concededly "somewhat more natural"[3] reading of the Act, and to defeat the Congressional purpose.

What was the policy and purpose of Congress in enacting the Rail Act? That question must be the starting point in any consideration of the availability of the Tucker Act remedy here. Congress was confronted by a novel situation of immense national importance: the imminent collapse of the rail industry in the Northeast brought on by its inability to generate enough revenues to meet operating expenses. The formulations developed in the depression for dealing with rail properties whose financial problems related to imbalanced capital structures were obsolete: the issue instead was the inability to meet current operating expenses, let alone fixed charges. Moreover, the problem was epidemic. Most of the Class I railroads in the Northeast were in bankruptcy.[4] In this context Congress attempted to deal with an unprecedented situation by confessedly experimental means.

The essence of the experiment was to determine whether the investment of limited federal funds could be leveraged by the use of other governmental powers into the creation of a functional rail system adequately serving the needs of the Northeast. The heart of the approach was and is to maintain in the hands of Congress strict control over the kind and amount of federal investment in the rescue attempt, so as to provide "necessary Federal financial assistance at the lowest possible cost to the general taxpayer" (Rail Act, Section 101(b)(6)). Congress was quite deliberately fashioning a new strategy to deal with the increas-

[3] Sp. Ct. Op., pp. 92-93.

[4] Congress also could foresee similar problems in other capital intensive industries affecting the public, most particularly problems concerning major defense contractors, huge airlines and vital public utilities.

ingly familiar phenomenon of public service industries whose public clientele was unable or unwilling to pay the cost of required service.

Evidence that Congress intended the Act to be a limited, controlled fiscal intervention is pervasive in the terms of the Act, its legislative history, the comments at the legislative oversight hearings[5] and the Amicus Curiae Brief of certain sponsors of the Rail Act in this Court.

1. *The Act Itself.* The Act creates a closed system which requires the continued integrity of the Northeast rail systems; requires conveyance of rail properties in accordance with a Final System Plan; and specifies and limits the amount of federal funds and other benefits to be made available to the explicitly private carrier (Conrail) created to receive them. It provides remedies which are the exclusive prerogative of a Special Court called into being for the purpose and excludes every other court from remedial intervention in the process. These remedies, according to the explicit terms of the Act, were meant to afford to interested parties the constitutional minimum due them, and by fair inference, were intended to leave over no constitutional entitlement to further federal remuneration from any other forum. The Rail Act thus defined the entire scope of the federal intervention which Congress, as a policy matter, wished to make, and prescribed exclusive procedures for its implementation.

That Congress intended to fine tune the investment of federal funds to be committed to the Northeast rail rescue is plainly seen in "the structure of the statute, and the relation, physical and logical, between its several parts,"[6] especially in those provisions which govern judi-

[5] Oversight Hearings before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 93d Cong., 2d Sess. (June 14, 1974).

[6] *Duparquet Huot & Moneuse Co.* v. *Evans*, 297 U.S. 216, 218 (Cardozo, J.).

cial intervention in the processes of the Rail Act.[7] In the first place, Congress sought a determination of whether the process of the Act would be fair and equitable to the estates of the debtors (Section 207(b)). While that procedure was, in Appellees' view, itself constitutionally infirm, it did represent the totality of Congressional tolerance toward explicit judicial intervention in the arrangements of the Act prior to the certification of the Final System Plan. The very narrowness of the permissible intervention confirms that Congress intended the process of the Act to be considered and judged on its own terms.

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[7] Appellants and the Special Court both rely on certain explicit repealing provisions in the Rail Act as circumstantial evidence that repeal of the Tucker Act was not intended. Each such provision is plainly intended to facilitate formulation and implementation of the Final System Plan; that is the sole object of the repealers. None of the provisions deals with remedies should effectuation of the Final System Plan fail and they shed no light, directly or inferentially, on Congressional intent in that regard.

Sections 202(a)(10) and 205(c)(2) avoid the usual advertising requirements prior to entry of governmental contracts thus making it easier for USRA and the Rail Services Planning Office to contract for services preparatory to and for implementation of a Final System Plan. Section 601(c) makes detailed environmental studies and statements unnecessary before the effective date of a Final System Plan thereby promoting uninhibited planning for a Final System Plan. Antitrust considerations need not affect such planning since Section 601(a)(2) makes antitrust laws inapplicable to the Plan. Sections 304(c), 304(f) and 601(b) make inoperative provisions of the Interstate Commerce Act when they are inconsistent with the Act. With respect to railroad abandonments, Sections 304(c) and 304(f) prohibit interference by other laws which would inhibit an efficacious design and enforcement system for the Final System Plan. Sections 601(b) and 207(b) eliminate statutory conflict which would impede formulation and implementation of the Plan by requiring dismissal of § 77 proceedings in certain circumstances and by prohibiting Bankruptcy Act application when inconsistent with the Act.

Section 207(b), as well as five other provisions, constrict the jurisdiction of federal courts to provide remedies to aggrieved parties.

(Footnote continued)

The procedures of the Act explicitly exclude any further judicial involvement in their inexorable progress until the Special Court performs the ministerial task of ordering the conveyance of rail properties subject to the Final System Plan pursuant to Section 303. The positioning of the procedures for determining whether the exchange is fair and equitable *after* rather than before the consummation of those conveyances underscores the design of the Act that the "key to the federal treasury" should not be relinquished by Congress to any court that might hold up the conveyances until further funding was made available.

Finally, of course, the closed circle within which those valuation proceedings move under the terms of the Act, with final recourse *against Conrail* by deficiency judgment under Section 303(c)(2)(C) still further emphasizes the exclusivity of the statutory pattern. The Special Court missed the real significance of the deficiency judgment: It is clear evidence in the very terms of the Act that if the provisions for compensation in the Act are themselves inadequate, the federal government, which mandated the taking, is not to be charged with the deficiency in value—the Treasury is not to stand as the guarantor of any such deficiency.

(Continued footnote)

Section 209(b) makes decisions of the Judicial Panel on Multidistrict Litigation non-appealable to any court; Section 207(b) restricts appeals under that section to only the Special Court; Section 209(a) makes the Final System Plan non-reviewable after Congressional approval or the running of a 60-day period; Section 206(d)(3) provides that certain ICC and USRA determinations are non-reviewable; Section 303(b)(2) disallows restraint or injunction by any court of conveyances ordered by the Special Court; and Section 303(d) allows review by the Supreme Court alone of the Special Court's decisions on compensation. All of these jurisdictional restrictions are aimed at expeditious planning and rapid implementation of a Final System Plan.

2. *The Legislative History.* The history of the Act, amply detailed in the briefs already submitted, was thought by the Special Court to be equivocal on whether Congress would prefer the Act to be struck down than to have the Tucker Act held available to make up its deficiencies. However, it takes a strained reading of the passages from the legislative history to render them equivocal. Separately and taken together, the various provisions quite clearly evince the understanding of the legislators as to the limited nature and extent of the intended investment of federal funds in the rescue of the Northeast rail system.

It is irrelevant that the Tucker Act was not mentioned by name so long as it is amply clear from the committee reports and from the debates that the Congressional design was intended to be exactly what the statute turned out to provide: the Rail Act was to be the exclusive mode of injecting federal funds into debilitated railroad systems of the Northeast, and the amounts explicitly provided by its terms were the only federal moneys to be invested in the enterprise.

On that point the history is utterly unequivocal. Assurances were repeatedly sought from the authors of the bill and its responsible managers in both houses that no blank check was being written by the Congress to bail out the destitute Northeast railroads, and that assurance was repeatedly given. The actual structure and plain words of the Rail Act are entirely consistent with that strategy. Residual recourse to the Tucker Act is entirely destructive of it.

3. *The Legislative Oversight Hearings and Congressional Amicus Brief.* The oversight hearings reflect the outrage of the principal sponsors of the bill that the executive branch had taken upon itself to urge the Court below to utter the blank check which the Congress had consciously withheld. There is no ambiguity in the oversight hearings about the hostility of the Congress toward the suggestion

that the judiciary should do indirectly what the legislature had consciously refrained from doing.

The Congressional Amicus Brief in this Court articulates precisely the point that Appellees make here: Congress intended an innovative approach to a novel problem designed to test whether limited federal intervention could produce an adequate functional result. The Amicus Brief rejects the suppositions of the Appellants, and the disposition of the Special Court, that the constituent parts of that experimental approach may properly be adjusted upon judicial review. Congress engaged, we understand its members to say, in a deliberate policy choice about the scope of intervention, and if that policy choice is found by the courts to be wanting, upon its own terms, then, "the Act must fall" (Amicus Curiae Br., p. 22).

The Special Court dismissed both the oversight hearings and the Amicus Brief with inappropriate disdain (Sp. Ct. Op., pp. 92-93, n. 99). Contrary to what the Special Court wrote, neither the oversight hearings nor the Amicus Brief constitutes an attempt to change the Rail Act by retrospective interpretation of its terms; both rather attempt to describe correctly what the mind of Congress was and what the design of the statute is. Justice Frankfurter cautioned that "Statutes cannot be read intelligently if the eye is closed to considerations evidenced in . . . the known temper of legislative opinion."[8] Here, the articulation of principal sponsors of the Rail Act, in formal hearings on the point, and in an extraordinary presentation to this Court on the legislative policy and purpose,[9] displays clearly enough the temper of legislative opinion and ought not be ignored.

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[8] Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum. L. Rev. 527, 539 (1947).

[9] The ranks of Representatives joining in this presentation have now increased to 104. Motion for Special Leave to Argue, ¶ 2.

The Tucker Act remedy is, then, contrary to the Special Court's Opinion, unavailable—precluded by a statutory scheme consistent only with that view, which effects an explicit Congressional policy to experiment with a limited federal investment in the Northeast railroads.

Beyond that point, however, it must be said that the entire discourse on the availability of the Tucker Act assumes a surreal quality. Every litigant before this Court must recognize the obvious fact of economic and political life that under no set of foreseeable circumstances is Congress going to acquiesce in judicially fashioned access to the Treasury via the Court of Claims. Not only the hostility that such a procedure elicited in the oversight hearings and the Amicus Brief, but the strategic theory underlying the Rail Act itself repels any such notion.

The same ample evidence that Congress has asserted its affirmative intent to control decisively the magnitude of federal funds invested in the rail system of the Northeast makes it certain, as a practical matter, that it is a question of when, not whether, Congress will reassert that control if the courts attempt to wrest it away by engrafting a Tucker Act remedy onto the Rail Act. Congress may act now; it may act upon the presentation to it of the Final System Plan; it may act when a deficiency judgment against Conrail is entered and cannot be paid, thus precipitating a new rail crisis; it may act after a Court of Claims judgment is entered and appropriations to pay it are sought. It has ample opportunities over the long sweep of the procedures of the Rail Act to reassert its intention to limit, in accordance with its best judgment, the size of federal financial commitment to the bankrupt estates.

To say this is not to "impugn the good faith of Congress."[10] Rather it is a recognition of the reality that Congress is a co-equal branch which has enacted an important statute after due deliberation, to achieve a planned result, and that Congress ought to be taken seriously when it announces by word and deed the limited character of its financial intervention.

[10] USRA Reply Brief, p. 15.

We raise these considerations not to suggest that Congress is "defiant" or will become so.[11] But the Tucker Act question arises in this litigation at all because Appellants have contended that its claimed availability provides an "adequate remedy at law" for the constitutional wrongs of which Appellees complain. The doctrine that an adequate remedy at law bars equitable relief deals with reality, not with formality. Equity itself is historically a rebellion against the formalism of common law. The "adequate remedy at law" formulation distills the practical considerations by which equity courts determine whether a litigant has, in true fact, some way of righting the wrong being done him as direct, certain and efficacious as the interposition of equity would afford.

It would be anomalous for this Court to hold that there exists a legal remedy under the Tucker Act sufficient to have required the lower court to abstain from granting its injunction, when such a remedy is incompatible with the statutory scheme, destructive of the legislative strategy and purpose, at odds with the legislative history and repudiated by the legislators themselves.

II.

The Unconstitutionality of the Rail Act in the Absence of a Tucker Act Remedy.

All three courts which have considered the Rail Act as applied to the Penn Central situation have now held that the Rail Act is unconstitutional in the absence of a Tucker

[11] See *id.*, p. 16.

Act remedy.[12] Differences in result arrived at by the Court below, by the Reorganization Court and by the Special Court are controlled entirely by the fact that the first two courts held that no Tucker Act remedy was available while the last court found that such a remedy was available to cure the otherwise unconstitutional exactions of the statute.[13]

In concluding that the Act, upon its own terms, does not afford sufficient assurance of fair compensation, the Special Court was plainly right. That Court found, in effect, that (the Tucker Act aside) the Rail Act imposed upon the owners and creditors of the estate a risk of loss which was irreconcilable with the concepts of fairness and equity embodied in the statutory standards and implicit in the Fifth Amendment.

The Special Court dealt separately with the issue of erosion and the question of the ultimate compensatory mechanisms of the Act and it is appropriate to address those issues briefly.

1. *Erosion.* The decision of the Special Court on the erosion question is very tightly drawn. Judge Friendly's opinion concludes that, upon a set of assumptions specified in the opinion, erosion either does not present an imminent problem or, if it does, can be dealt with by injunctive relief such as that furnished below (Sp. Ct. Op., pp. 55-57).

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[12] A similar intimation also appears in *In re Penn Central Transp. Co.*, 494 F.2d 270 (3d Cir. 1973), *cert. denied*, — U.S.L.W. — (U.S. Oct. 15, 1974) (No. 73-1672) (*"Columbus Options"*).

[13] It is at least an overstatement for Appellant USRA to argue in its reply brief that the Special Court "decisively rejected" all of the constitutional challenges in these cases. USRA Reply Brief, pp. 1, 3. The Special Court did nothing of the sort. On the contrary, the central constitutional challenge mounted by Appellees—that the terms of the Act itself do not provide adequate assurance of just compensation for either interim erosion or ultimate conveyance—was upheld by the Special Court but for the existence of the Tucker Act (Sp. Ct. Op., pp. 55-57; 68-69).

The problem with the analysis of erosion in the opinion of the Special Court is that the assumptions upon which it entirely rests are, by and large, unsupportable.[14]

For example, the Special Court indulged in an entirely speculative assumption when it declared its belief that the regulatory agencies controlling the revenues of the bankrupt railroads could be expected to grant rate increases during the interim period sufficient in amount and prompt enough in time to keep pace with inflation. No scrap of evidence exists in the record to justify such an assumption, and certainly the Interstate Commerce Commission, which was a party to the proceeding, never made any such commitment. Moreover, such an assumption flies in the face of a massive body of industry experience. The assumption that rate increases sufficient to meet escalating operational expenses can be routinely expected is therefore little more than wishful thinking.

The Special Court made a diametrically opposed assumption with regard to the probable dispatch with which regulatory agencies would process applications for service termination or line abandonments in the event of a judicial determination that continued operations would be unconstitutional. Here, in sharp contradistinction to its expectation that the ICC would act with speed and generosity in granting rate increases, the Special Court assumed that the complexity of environmental and service considerations would bog down such abandonment proceedings for at least as long as the minimum interim period prescribed by the Rail Act. Again, no evidence in the record supported that conclusion. It is true that abandonment procedures had

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[14] The Penn Central Trustees, in the Appendix to their reply brief, have addressed directly some of the details of the analysis of erosion contained in the Special Court's opinion, and Appellees subscribe to the views expressed by the Trustees in this respect. In addition, the "Reply Brief" of Penn Central Company points to the unsupported assumption in the Special Court opinion that on the date of enactment of the Rail Act the equity of Penn Central Transportation Company was valueless.

ground to a halt because of litigation over the necessity of filing statements under the National Environmental Policy Act. And it is true that efforts could reasonably be anticipated to keep in service for the account of shippers or localities lines which were sought to be abandoned. But the Special Court nowhere cites any authority that such abandonment procedures may properly take their presumably leisurely course when constitutional considerations underlie their prosecution. On the contrary, Judge Friendly in the *New Haven*[15] case observed that a certificate of abandonment under such circumstances was a matter of constitutional right which the applying railroad was entitled to obtain "with appropriate speed." Indeed, in Judge Friendly's opinion in the Special Court, one finds an echo of the doubt that abandonment proceedings under constitutionally impelled circumstances may be impeded by the familiar statutory obstacles (Sp. Ct. Op., pp. 49-50).

Finally, the assumption that the abandonment with dispatch to which the Penn Central might be entitled could nevertheless be suffered to drag on for two years takes no account of the peril that such abandonment procedures might have to be commenced at the end of the interim period if no Final System Plan satisfactory to Congress has by then emerged. Taking the Special Court at its pessimistic word in such eventuality, at least four years of further loss operations would confront the Penn Central system until the interim period had been exhausted and regulatory procedures completed for the termination of hopelessly losing service.

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[15] *New York, N.H. & H.R.R. First Mtg. 4% Bondholders' Comm.* v. *United States*, 305 F.Supp. 1049, 1055 (S.D.N.Y. 1969), *vacated on other grounds sub. nom. New Haven Inclusion Cases*, 399 U.S. 392. On this point see also *New Haven Inclusion Cases* at 459-67.

The most important assumption underlying the Special Court's erosion discussion was that the Final System Plan could be effectuated substantially in accordance with the schedule set out in the Rail Act. The Special Court acknowledged that "reasonably entertained doubt that USRA will be able to meet its prescribed schedule . . . or that Congress may not accept USRA's initial effort would require reformulation or excision of § 304(f) (as imposed, for example, by the *Connecticut General* court) unless a Tucker Act remedy exists" (Sp. Ct. Op., pp. 56-57). It is already clear that USRA will not be able to meet its prescribed schedule and the key assumption underlying the Special Court's decision on erosion has already been belied.

In the first place, as the statutory deadline for the announcement of the preliminary system plan approaches, it is apparent that USRA has not progressed to the point of announcing any such plan. It now appears that USRA is still floating trial balloons, some of them bearing no relation to the scheme set out in the Act, and it is confessedly in no position to outline for Congress and the affected public the character of any proposed system plan.[16] Not being in position to do so on time, USRA plainly cannot receive on schedule the comments of the interested public contemplated by the Rail Act as ingredients in the formulation of the Final System Plan.

Emphasizing the incapacity of USRA to meet the schedule assumed by the Special Court, legislation has been introduced in Congress to postpone for four months each the presentation of the preliminary system plan and the Final System Plan. In addition, the complexity of the task is evidenced by the simultaneous request by USRA for authority to spend $14 million more on the preparation of such plans than was allowed by the Rail Act. Apart from reasonable speculation that a plan requiring 18 months and $40 million to produce may require more than sixty days' consideration by the public before a Final System

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[16] See Sp. Ct. Op., App. B.

Plan can be hammered out (Rail Act, Section 207(a), (c)), the effect of these prospective delays is to lengthen the interim period materially beyond that prescribed by the Act and assumed by the Special Court.

On a simple arithmetical basis, the Penn Central estate is experiencing losses at the rate of $16 million a month. These losses are not, of course, the same in every month, and would be aggravated by continued recessional economic developments, by serious adverse weather conditions, by the advent of a threatened coal strike or other similarly foreseeable exigencies, as well as others not now threatened. In light of this, the Federal Appellants now acknowledge that the delays which are presently foreseeable may warrant a court in ordering termination of services under certain circumstances and may justify injunctive relief similar to that entered below, in the absence of a Tucker Act remedy.[17]

Under these circumstances, assuming the absence of a Tucker Act remedy, we read the Special Court as holding that the provisions for compensation contained in Section 303 of the Act are constitutionally inadequate to provide for either the value of the properties to be conveyed or the costs of interim erosion and as expressing the view that the injunctive relief accorded below was justifiable (Sp. Ct. Op., pp. 55-57).

2. *The Compensatory Mechanisms of Section 303.* The Special Court explicitly held, as we have argued here, that, in the absence of a Tucker Act remedy, Section 303 of the Rail Act itself does not provide sufficient assurance that the estates will receive fair compensation meeting the statutory standards of fairness and equity and the constitutional standard of the Fifth Amendment (Sp. Ct. Op., pp. 68-69).

[17] Reply Brief for the Federal Parties, p. 3.

It is fair to say that the Special Court put the best face possible upon the question of Conrail viability. Indeed, Appellees here contend that the Special Court was excessive in its optimism and unduly liberal in its interpretation of governing legal standards.[18]

Even indulging such generous views, the Special Court nevertheless held that (the Tucker Act aside) the conveyance provisions of Section 303(b) of the Rail Act—which the Special Court characterized as "the very heart of the Act" (Sp. Ct. Op., p. 67)—fail to provide adequate assurance of just compensation or judicial machinery sufficient to protect the bankrupt estates from unconstitutional impositions.

It is plain enough that the Special Court also found these compensatory provisions insufficient to provide for interim erosion to the extent that might be incurred by protraction of the schedule of the Rail Act. On the rosiest view of its provisions and of Conrail's prospects, then, the Special Court was forced to the conclusion that, absent

[18] For example, the elaborate dictum on the probative value of the Ingraham testimony reflecting the bleak prospects of Conrail involved the Special Court again in the adoption of assumptions wholly unsupported by any record evidence. To cure this deficiency, the Special Court imported into the Penn Central decision expert evidence introduced in the *Ann Arbor* proceedings as to which the Penn Central parties were not privy and had no opportunity to cross-examine or to submit briefs. The *Ann Arbor* affidavits are themselves riddled with error and form no valid basis for a critique of the careful Ingraham presentation. Nonetheless they were given credence by the Special Court. For another example, the Special Court appears to brush aside the decision of this Court in *Almota Farmers Elev. & Whse. Co.* v. *United States*, 409 U.S. 470, and its ancestors requiring that in condemnation the condemnee receive the perfect monetary equivalent of the property he has lost (Sp. Ct. Op., pp. 103-04). Perhaps, speculates the Special Court, an indeterminate package of securities might in some circumstances satisfy that apparently more rigorous standard.

Appellees contend these views represent overgenerous interpretations of the facts and of the law.

a Tucker Act remedy, "we think that the Act would be unconstitutional in any event. . . ." (Sp. Ct. Op., p. 57). That, of course, is substantially the position that Appellees urge here.

III.

Conclusion

At this juncture it seems clear that the Rail Act fails to provide adequate *intrinsic* assurance of fair compensation for either interim erosion or the ultimate conveyances it mandates. None of the courts (including the Special Court) which have examined the application of the Rail Act to Penn Central has held to the contrary.

Two approaches have been suggested by the courts to deal with this constitutional deficiency: The first is to insert into the statutory scheme of the Rail Act an additional guaranty of the availability of federal funds under the Tucker Act in order to create judicially the assurance lacking under the terms of the Act itself. The second is to excise, by a carefully constructed injunction, those portions of the Rail Act which threaten interim or ultimate taking without such assurance, leaving to Congress the opportunity to amend the Rail Act in the light of such ruling. The Special Court chose the former; the Court below chose the latter.

Appellees submit that due respect for the policy and purpose of the national legislature as well as a proper regard for the constitutionally protected interests of the Appellees indicate that the Court below was right in its approach and should be, in all respects, affirmed.

Respectfully submitted,

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see also
74-166, 167,168